SUPREME COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 750

GLENN MARTIN HARRINGTON,

Petitioner,

vs.

CALIFORNIA.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION 2

PETITIONER'S BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 750

GLENN MARTIN HARRINGTON,

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vs.

THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION 2

OPENING BRIEF FOR PETITIONER, GLENN MARTIN HARRINGTON

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Glenn Martin Harrington, having been granted his petition for a Writ of Certiorari on November 18, 1968 by this Honorable Court, comes now by his attorney, Roger S. Hanson, and herewith presents his opening brief:

Opinion Below

The opinion of the Court of Appeals of the State of California, Second Appellate District, Division 2, is entitled People of the State of California vs. Jesse Bosby, Gilbert Cooper, George Rhone, and Glenn Martin Harrington, and is officially recorded at 256 A.C.A. 555; said opinion is reprinted verbatim in the Appendix "A" of petitioner's Petition for Certiorari, and is also set forth in the Single Appendix at Page 429.

Petitioner sought a hearing and review in the Supreme Court of the State of California and the Order Denying Hearing was filed on January 17, 1968, over the mandate of Chief Justice Roger J. Traynor of California. Said Order Denying Hearing is set forth verbatim in the Single Appendix at Page 441.

Jurisdiction

The jurisdiction of this Honorable Court is invoked under Title 28, U.S.C.A., Section 1257.

Questions Presented

Petitioner heretofore in his petition for a Writ of Certiorari posed the following six issues to this Honorable Court:

1. Does the joint trial of codefendants in a criminal proceeding before a jury composed of lay citizens where confessions of codefendants implicating this petitioner are introduced in evidence and where said codefendants do not take the witness stand for cross examination purposes vio-

late the confrontation clause of the 6th Amendment and the due process clause of the 14th Amendment to the United States Constitution?

2. Does the process of instructing that lay jury that they are to consider the confessions only as evidence against the confessor and not as evidence against the implicated party sufficiently guarantee due process of law under the 14th Amendment to the party implicated in view of this Honorable Court's ruling in *Jackson* v. *Denno* (1964), 378 U.S. 368, 12 L.Ed.2d 908, 84 S.Ct. 1774?

3. Is the doctrine of *Delli Paoli* v. *United States* (1957), 353 U.S. 232, 1 L.Ed.2d 278, 77 S.Ct. 294 still valid law in view of the combined effect of the decisions of this Honorable Court in *Jackson* v. *Denno* (1964), 378 U.S. 368, 12 L.Ed.2d 908, 84 S.Ct. 1774, *Turner* v. *Louisiana* (1965), 379 U.S. 466, 13 L.Ed.2d 424, 85 S.Ct. 546, *Pointer* v. *Texas* (1965), 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065, *Douglas* v. *Alabama* (1965), 380 U.S. 415, 13 L.Ed.2d 934, 85 S.Ct. 1074 and *Brookhart* v. *Janis* (1966), 384 U.S. 1, 16 L.Ed.2d 314, 86 S.Ct. 1245?

4. Does not the combined effects of the above cited cases in question 3, interpreting the 6th and 14th Amendments, require, as a protection of a specific constitutional right, that procedures as set forth by the Supreme Court of the State of California in *People* v. *Aranda, et al.* (1965), 63 Cal. 2d 518 be now regarded as the law of the land?

5. Because this violation of this specific constitutional right involves the violation of a right protected by the United States Constitution, is not a reviewing Court re-

quired to apply a harmless error test at least as strict as that announced in *Chapman* v. *California* (1967), 386 U.S. 18, 23, 17 L.Ed.2d 705, 87 S.Ct. 824, viz: "the prosecution must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained?"

6. Does not the denial of a motion to sever the moving party's trial from that of his codefendant amount to a denial of due process of law whenever said joint trial will require the jury to determine both the voluntary nature and truth of an extrajudicial statement which incriminates both the maker and his codefendant?

Petitioner herewith respectfully adds these 7th, 8th and 9th issues:

7. DOES NOT THE LANGUAGE OF THE HONORABLE JUSTICE HUGO L. BLACK, EXPRESSING THE VIEWS OF EIGHT MEMBERS OF THIS COURT, FOUND IN *BROOKHART* v. *JANIS*, 384 U.S. 1, 16 L.Ed.2d 314, 86 S.Ct. 1245, AT PAGE 316 OF 16 L.Ed.2d 314, NAMELY:

"IN THIS COURT RESPONDENT ADMITS THAT:

"[I]F THERE WAS HERE A DENIAL OF CROSS EXAMINATION WITHOUT WAIVER, IT WOULD BE A CONSTITUTIONAL ERROR OF THE FIRST MAGNITUDE *AND NO AMOUNT OF SHOWING OF WANT OF PREJUDICE WOULD CURE IT.*"

"THIS CONCESSION IS PROPERLY MADE.",

PRECLUDE APPLYING *ANY* HARMLESS ERROR RULE TO THIS PETITIONER'S CASE?

8. DOES NOT THE RULINGS OF THIS HONORABLE COURT IN *GEORGE WILLIAM BRUTON* v. *UNITED STATES*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620, DECIDED MAY 20, 1968, AND *ROBERTS* v. *RUSSELL*, 392 U.S. 293, 20 L.Ed.2d 1100, 88 S.Ct. 1921, ANSWER THIS PETITIONER'S ISSUES CITED ABOVE IN HIS FAVOR, REQUIRING THIS HONORABLE COURT TO REVERSE HIS CONVICTION?

9. DOES NOT THE APPLICATION OF THE FEDERAL HARMLESS ERROR RULE, AS ENUNCIATED IN *CHAPMAN* v. *CALIFORNIA* (1967), 386 U.S. 18, 23, 17 L.Ed.2d 705, 87 S.Ct. 824, IF THIS COURT DEEMS IT REQUIRED SHOULD IT RESOLVE ISSUES 7 AND 8 UNFAVORABLE TO THIS PETITIONER, REQUIRE PETITIONER'S CONVICTION BE REVERSED?

United States Constitutional Provisions Involved

1. 6th Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

2. 14th Amendment

Section 1

"... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

Petitioner Glenn M. Harrington, along with codefendants Jesse Bosby, George Rhone and Gilbert Cooper, were charged with attempted robbery and first degree murder in the alleged attempt to rob a grocery store and market in Los Angeles, California.

All were brought to trial jointly in the Superior Court of the State of California for the County of Los Angeles before the Honorable Joseph Wapner.

Petitioner Harrington is a Caucasian, and the other three codefendants are Negroes. Although petitioner Harrington was allegedly identified as being at the scene of the crime, the proprietor of the store testified that she told police that "all four defendants were Negro" and other evidence tended to undermine the identification made of petitioner Harrington as an active participant in the robbery and murder.

In pre-trial incustodial interrogation, extensive confessions were obtained from all three codefendants, implicating Glenn M. Harrington. All three confessions were read before the jury. Two of them consisted of documents over

30 pages in length. Harrington made no confession and pled not guilty. Defendant Rhone did take the stand for cross-examination, but the other two codefendants did not. "Appropriate" limiting instructions to consider each of these extensive confessions only against the confessor were read to the jury.

It is thus evident that three major, repeated, machine-gun-like, impacting confessions implicating petitioner Harrington were read to the jury; that these three codefendants served as witnesses against Harrington cannot be seriously doubted unless one indulges in the fiction that the lay jury could effectively compartmentalize its mind to give no credence to the repeated implications of Harrington by the other defendants. Harrington was denied the opportunity to cross-examine defendants Cooper and Bosby at all for the reason they chose to invoke their constitutional rights not to be witnesses against themselves.

All four defendants were convicted of first degree murder; said convictions were affirmed by the California State Court of Appeals, Second Appellate District, 256 A.C.A. 555, despite the court's acknowledgment of the violation of the California "Aranda Rule", *People* v. *Aranda*, 63 Cal.2d 518. The Supreme Court of California denied a Petition for Hearing on January 17, 1968, and its Order became final 30 days later, February 16, 1968.

Petitioner Harrington via his trial counsel made numerous and repeated motions to have his trial severed from the other three codefendants. In a pre-trial motion, said request was denied. After assignment to the trial court, the Single Appendix on the following pages indicates the extensive efforts expended by counsel:

Single Appendix Page 34; Single Appendix Page 49.

It is to be noted that counsel for Harrington ably and repeatedly cited the *United States* v. *Delli Paoli* and *Jackson* v. *Denno* decisions (S.A. Page 37) as authority for his argument to sever the trials. At all times, the motions were denied by the trial court.

The trial court, acutely aware of the problem, joined in extensive efforts to "edit" each one of the confessions. After numerous attempts, petitioner's counsel complained that, after the extensive editing job to blank out the names of codefendants, the jury would no longer be able to ascertain the extent to which each defendant participated. Because of this, the trial court abandoned effort to delete names and inculpatory phraseology and allowed each lengthy confession to be read in its entirety. In the Single Appendix at page 176 begins the extensive effort of the trial court to edit the confession of defendant Gilbert Cooper. The procedure occupied some 36 pages of effort of the trial court in the transcript.

On page 215 of the Single Appendix, the court began supervising the editing job of the confession of Jesse Bosby. Petitioner Harrington's counsel, at page 216 Single Appendix, entered timely objections to the deletion process, as it replaced the concrete names with ambiguous phrases such as "this other man"; the name of codefendant Cooper was here changed to "this other man", and petitioner's attorney felt the jury might speculate that "this other man" might be Harrington. Numerous other objections to the process were entered by respective counsel.

In finality, the trial judge felt that petitioner's counsel was accusing him of making the situation worse for peti-

tioner after the deletions than before, and allowed (see pages 234-242 Single Appendix) all incriminating confessions into evidence totally unedited. In this way, with the three Negroes making confessions each implicating each other and petitioner Harrington, there is little doubt that the lay jury had no difficulty in concluding that all three codefendants before the court were involved, and each implicated petitioner by their confession.

Interestingly, the police officer who was to read the edited, greatly altered statements to the jury voiced his own objections to the trial judge (pages 235-237 Single Appendix). As altered, *no names at all appeared*, and the officer felt the jury would believe him an incompetent police investigator because he had failed to ascertain the names of the parties involved!

In finality, then, for the purposes of the brief, petitioner Glenn Martin Harrington was tried with three codefendants, all of whom made confessions implicating Harrington. Editing of said confessions was attempted by the trial judge and all counsel, but was abandoned when the result became ridiculous. All three unedited confessions implicating petitioner were read to the twelve men lay jury with "appropriate" instructions to consider each only against the confessor. Two of the three codefendants failed to take the stand for cross-examination purposes. Petitioner contends each codefendant was a witness who testified against petitioner without confrontation because of the inability of a lay jury to distinguish and compartmentalize the facts in their minds, restricting it only to the confessor.

Upon the authority of *Jackson* v. *Denno* (1964), 378 U.S. 368, 12 L.Ed.2d 908, 84 S.Ct. 1774, *Pointer* v. *Texas* (1965),

380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065, *Douglas* v. *Alabama* (1965), 380 U.S. 415, 13 L.Ed.2d 934, 85 S.Ct. 1074 and *Brookhart* v. *Janis* (1966), 384 U.S. 1, 16 L.Ed.2d 314, 86 S.Ct. 1245, petitioner contends he has been denied the right to confront all the witnesses testifying against him, and has therefore been denied Due Process of Law under the Sixth and Fourteenth Amendments to the United States Constitution.

Since petitioner filed his Petition for a Writ of Certiorari, this Honorable Court decided two significant cases, *Bruton* v. *United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620, on May 20, 1968, and *Roberts* v. *Russell*, 392 U.S. 293, 20 L.Ed.2d 1100, 88 S.Ct. 1921.

Petitioner contends the rulings of these cases should cause this Honorable Court to reverse his conviction.

Petitioner's case, however, has the following significant factors:

(1) Codefendants Gilbert Cooper and Jesse Bosby made extensive confessions inculpating petitioner; neither codefendant took the stand for cross-examination purposes and petitioner was therefore denied his right of confrontation within the meaning of *Brookhart* v. *Janis*, *Bruton* v. *United States*, and *Roberts* v. *Russell*.

(2) Codefendant George Rhone made an extensive confession inculpating petitioner, but did take the stand for cross-examination, and petitioner did exercise his right and opportunity to cross-examine codefendant Rhone.

(3) Petitioner himself made statements falling short of either an admission of guilt or confession, which placed him at the scene of the crime, which were read to the jury, and

which were held by the Court of Appeals at 256 A.C.A. 555 to satisfy the Advisement of Constitutional Rights then required under California law in *People* v. *Dorado*, 62 Cal.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361. (Page 432, Single Appendix.)

(4) Several eyewitnesses, among them Ardis Allison Robbins and Darrell Ashcraft, placed petitioner at the scene of the crime, armed and actively participating in said crime.

(5) Both prosecution witnesses Robbins and Ashcraft admitted during trial that they had told police "four Negroes committed the crime"; petitioner is a Caucasian and codefendants Rhone, Bosby and Cooper are Negroes.

(6) This Honorable Court's opinions in *Bruton* v. *United States*, 391 U.S. 123, and *Roberts* v. *Russell*, 392 U.S. 293 are silent on the following significant issues:

a. Was there any independent evidence in addition to the confession of the codefendant incriminating either Bruton or Roberts which could have independently sustained the conviction?

b. Did either Bruton or Roberts themselves make any incriminating statements?

c. Is the federal harmless error rule to be applied in the cases evidencing the Bruton or Roberts error, or for that matter,

d. Shall it be required to have recourse to a harmless error rule at all?

This petitioner shall develop his arguments and authority directed to answering and discussing the above six signif-

icant factors, and the included subdivisions, as well as developing issues 7, 8, and 9 as set forth above in this Opening Brief.

ARGUMENT

I.

Petitioner's Conviction Should Be Reversed Automatically Because the Lack of Confrontation and Denial of Cross-Examination Was a Constitutional Error of the First Magnitude, and No Amount of Showing of Want of Prejudice Would Cure It.

Justice Black of this Honorable Court, in writing for the 8-man opinion of the Court in *Brookhart* v. *Janis,* 384 U.S. 1, 16 L.Ed.2d 314, 86 S.Ct. 1245, at P. 316 of 16 L.Ed.2d 314 stated:

"In this Court respondent admits that:

> "'[I]f there was here a denial of cross-examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'"

[1-3] This concession is properly made. The Sixth Amendment provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . " And in Pointer v. Texas, 380 US 400, 406, 13 L.ed.2d 923, 927, 85 S Ct 1065, we held that the confrontation guarantee of the Sixth Amendment including the right of cross-examination "is 'to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.' Malloy v.

Hogan, supra, 378 US, at 10 [12 L.ed.2d at 661]." See also Douglas v. Alabama, 380 US 415, 13 L.ed.2d 934, 85 S.Ct. 1074. It follows that unless petitioner did actually waive his right to be confronted with and to cross-examine these witnesses, his federally guaranteed constitutional rights have been denied in two ways. In the first place he was denied the right to cross-examine at all any witnesses who testified against him. In the second place there was introduced as evidence against him an alleged confession, made out of court by one of his co-defendants, Mitchell, who did not testify in court, and petitioner was therefore denied any opportunity whatever to confront and cross-examine the witness who made this very damaging statement. We therefore pass on to the question of waiver."

In the above case, it is acknowledged that the purpose of introducing the alleged confessions of the codefendant Mitchell was the avowed used of same against petitioner Brookhart; this Honorable Court struck that down as unconstitutional under the withholding of right to cross-examine a witness *who testified against Brookhart.* In the instant case, the respondent State of California sought to cure the error, or prevent the error, by "appropriate" jury instructions.

Instructions to the jury on this point are totally inadequate to prevent this "Constitutional error of the first magnitude."

In *Bruton* v. *United States,* this Honorable Court, speaking through Justice William Brennan stated at 479 of 20 L.Ed.2d 476:

> "We hold that, because of the substantial risk that the jury, *despite instructions to the contrary,* looked to

> the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evan's confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. We therefore overrule Delli Paoli and reverse."

Hence, it is submitted that in considering the mandates of *Brookhart* v. *Janis* and *Bruton* v. *United States* together, there is no room nor possibility for the application of any "harmless error rule," for "if there was here a denial of cross-examination without waiver, it would be a constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." (16 L.Ed.2d 314, 316)

The fact that codefendants Gilbert Cooper and Jesse Bosby did not take the stand at all, but the prosecution read their confessions unedited to the jury, creates the error; it is submitted that regardless of any other evidence tending to show this petitioner Glenn M. Harrington guilty of committing this crime, the aforementioned "constitutional error of the first magnitude" occurred, and it is futile for the respondent State of California to argue that there was want of, or lack of, prejudice.

Petitioner has researched the law in several of the leading state jurisdictions to glean state authority for this holding this error a constitutional infirmity. It seems clear that the leading jurisdictions of Massachusetts, Illinois, New York, Ohio, and California have all recognized the error and have sought to prevent it by mandate of their highest state tribunals.

In a case recently celebrating its 100th birthday, the Supreme Judicial Court of Massachusetts set forth the Rule in the Commonwealth which still is valid law. In *Commonwealth* v. *Silas James and another* (1868), 99 Mass. 438, 440, Chief Justice Chapman stated:

> "The general rule is, that persons jointly indicted should be tried together. It is conceded that the court may in its discretion order separate trials. This should not be done unless it appears that one or more of the defendants may be prejudiced by a joint trial. The fact that it may affect their right of challenge is not a sufficient reason for directing separate trials. If it were, it would be a reason for changing the general rule, as it applies to all cases. But in the present case, if the Commonwealth intends to offer in evidence the whole confession of Charles T. James, its application to Silas James as well as to himself may prejudice Silas, and the motion should be granted. We regard this, however, as an exceptional case. It will generally be safe to try parties together, although some admissions may be made by one that are not binding on the other."

The opinion states the facts of that case, leading the Chief Justice of Massachusetts to the conclusion which he ultimately arrived:

> "Indictment against Silas James and Charles T. James for the murder of Joseph G. Clark.
>
> Before the jury were called, the counsel of Silas James moved that he might have a separate trial, assigning specially as reason therefor that in support of the prosecution evidence would probably be introduced of a confession by Charles T. James, which implicated

both himself and Silas in the commission of the crime as charged in the indictment. And the testimony of a witness before the coroner's jury was read, which tended to prove such confession.

G. F. Verry & S. Utley, for Silas James. It is the custom to grant separate trials of prisoners indicted together, whenever requested. *United States* v. *Marchant*, 4 Mason, 170, 171. In the present case, the evidence of the confession will be competent against one of the prisoners, and incompetent against the other; but neither counsel nor court could prevent its having an effect upon the minds of the jury against Silas. Certainly the court would feel it a duty to keep this evidence from prejudicing the case of Silas. See *Commonwealth* v. *Robinson*, 1 Gray, 555. But as the confession itself implicates Silas in express terms, his case could not fail to be prejudiced. Besides: if the two prisoners are tried together, each has his right to challenge twenty-two jurors peremptorily. The result may follow that one of the prisoners will challenge certain jurors whom the other would wish to retain upon the panel; and thus the rights of each will be prejudiced."

It is to be noted and called to the attention of this Honorable Supreme Court of the United States that as early as 20 years hereto prior, the learned Ohio State Supreme Court considered the prejudicial effect created by jointly trying two or more defendants in the same proceedings, using the implicating confession of one defendant in the same trial with "appropriate" instructions to the jury to consider it only against the maker and disregard it against any codefendant implicated.

Typical of these is a 1949 decision of the Supreme Court of Ohio, which unanimously reversed defendant-appellant Rosen's conviction, creating in Ohio a rule similar to the California Supreme Court's "Aranda Rule," *People* v. *Aranda,* 63 Cal.2d 518. This Rule of course is tantamountly similar and analogous to this Honorable Court's Rulings in *Bruton* v. *United States,* 391 U.S. 123 (May 20, 1968), and its decision making retroactive the Bruton Rule and applying it to the States via the 14th Amendment Due Process Clause, *Roberts* v. *Russell,* 392 U.S. 293 (June 10, 1968).

In *Rosen* v. *State of Ohio,* 151 Ohio St. 339, 39 Ohio Opinions 182, 183, Justice Matthias wrote for the unanimous Supreme Court of Ohio:

"Although the original application for a separate trial was based on "conversations" said to have occurred between codefendants of Rosen and police officers, the *renewal* of the application was based upon the announcement of the prosecuting attorney that he expected to offer in evidence the confession of a codefendant."

The Ohio Supreme Court pointed out that the same issue arose before in *State* v. *Fox,* 133 Ohio St. 154, 10 Ohio Opinions 218, 12 N.E. 2d 413, but that failure of the defendants counsel to object and ask for separate trials precluded the Supreme Court of Ohio from reviewing that issue.

Continuing in the opinion in *Rosen* v. *Ohio,* the Supreme Court of Ohio stated:

"In the instant case the application for a separate trial was based upon the specific ground of the proposed introduction of a codefendant's confession containing statements claimed to be prejudicial to Rosen. It was the clear duty of the trial court, when his attention was challenged to the

claimed prejudicial character of the confession, to hear and determine that question . . . The fact must be recognized, however, that in many cases the admission of such ex parte statements creates impressions so adverse that they may not be eradicated from the minds of the members of the jury. The prejudicial matter should be stricken out or deleted before the confession is admitted in evidence. The statement in the alleged confession indicated Rosen had planned, or at least participated in planning, the crime and received a portion of the proceeds thereof . . . There was thrust upon the defendant Rosen the burden of refuting the ex parte statement against him by a codefendant . . . In our opinion the action of the trial court constituted an abuse of discretion resulting prejudicially to the defendant Rosen."

"The judgment of the Court of Appeals is, accordingly, reversed and the cause is remanded to the Court of Common Pleas for a new trial."

It is to be noted that the conviction of Rosen was reversed without further consideration of the particular prejudicial effect of the confession, that is, apparently without recourse to a "harmless error rule."

The Ohio Supreme Court reaffirmed its *Rosen* decision unanimously on November 23, 1949 in *Marie Abbott* v. *Ohio,* 152 Ohio St. 228, 40 Ohio Opinions ——, in a potential capital case. It is to be noted that in *Abbott, supra,* the Ohio Court made its *Rosen* ruling retroactive, noting that:

"In justice to the trial Court in the instant case (Abbott), it should be stated in passing upon this question the Court did not have the benefit of the views of this court on a similar question later decided in the case of State v. Rosen,

151 Ohio St. 339, 39 Ohio Opinions 182, 86 N.E.(2d), 24, to which reference will hereinafter be made."

Again, in *Abbott*, the Ohio Court, like in *Rosen*, made no reference to a "harmless error rule."

The error was deemed to be inherently prejudicial.

The Supreme Court of Illinois in a lengthy series of cases dating back to the year 1916 clearly established the Illinois viewpoint on the joint trial of codefendants with use of confessions made by one codefendant in the joint trial, even though tempered by instructions to the jury to disregard the confession as against the non-maker.

In *People of the State of Illinois* v. *Frederick Buckminster*, June 22, 1916, the Illinois High Tribunal stated, inter alia, at 444 of 274 Ill. 435:

"Even if it be assumed that the confession could be admitted against Fink for the purpose of impeaching him if he were being tried alone, we do not think that part of his confession which affected Buckminster, in view of the record before us, should have been admitted for any purpose when Buckminster was on trial jointly with Fink. It has long been the settled rule of law that the voluntary confession of one person made after the commission of the crime cannot be admitted against a co-defendant unless made in the presence of the co-defendant and assented to by him. (I R. C. L. 520; 12 Cyc. 440; 2 Wharton's Crim. Evidence,—10th ed.—secs. 699, 700) But if co-defendants are tried together, the usual rule has been to hold that such confession can be admitted against the one who made it, with instructions by the court to the jury that it is only admitted against that one defendant, and is not to be considered as evidence against his co-defendant. (I R. C. L.

574, and cited cases; 6 Am. & Eng. Ency. of Law,—2d ed. —572.) The wisdom of this rule has been questioned more than once. In some of the earlier English cases the judges ruled that the confession, when admitted, should not contain the name of the other prisoner implicated thereby (Archbold's Crim. Pr. & Pl.—Waterman's 7th ed.—409), and it has sometimes been stated that it was impossible not to feel that such a confession, even though limited by instructions to apply only to one defendant, must inevitably have its effect upon the minds of the jury as to the other defendant. (Rex v. Martin, 4 Ann. Cas. 912.) In the opinions in that case, and the note attached thereto, the authorities on this question are reviewed. To obviate the evils arising from the possibility of the jury being misled by such confessions against the co-defendant, the rule is general that where one of several defendants jointly indicted has made admissions or confessions implicating others, a severance should be ordered unless the attorney for the State declares that such admissions or confessions will not be offered in evidence on the trial. (19 Ency. of Pl. & Pr. 528; Wharton's Crim. Pl. & Pr.—9th ed.—sec. 310; I Bishop's Crim. Proc.—3d ed.—sec. 1019a.) Some of the cases have stated that, on the plainest principles of justice, if the prosecutor intends to use such confession the prisoners should be tried separately. (Queen v. Weir, 3 Can. Crim. Cas. 351; Rex v. Martin, supra.) It is very clear from all the authorities that the courts have realized the evils of admitting confessions on behalf of one defendant that implicated a co-defendant, even though limited by the trial court to the person who made the confession, and have only permitted such a confession to be admitted, when two were being tried jointly, because there seemed no prac-

tical way of reaching a right result, under the law, as to the person who made the confession, without admitting it; that the injury as to the co-defendant might be less than the evil that would arise in the enforcement of the criminal law if the confession were shut out entirely. Indeed, the opinions in *Rex* v. *Martin, supra,* indicate that the judges there might not have held that such a confession was competent for any purpose when it implicated a co-defendant, if they had not thought it was the settled law under former decisions.

If the part of the confession that pertains to the guilt of the co-defendant can be properly left out without in any way weakening the confession as to the one who made it, we can conceive of no reason why the court should not rule that only that part of the confession be admitted that does not in any way implicate the co-defendant. While the point has never been passed upon directly by this court, when the question was necessary for the decision of the case, it has been plainly intimated in two cases that this ought to be done even as to voluntary confessions. In *People* v. *Anderson,* 239 Ill. 168, the court said (p. 180): "No man can confess for anyone but himself. As above indicated, however, each statement contained admissions of fact which the jury might rightfully regard as tending to show the guilt of the man making the statement. If there was in either statement anything the effect of which was to indicate the guilt of Anderson without tending to show the guilt of the man making the statement, that part of the statement was not properly admissible in this case, where Anderson was on trial." Again, in *McCann* v. *People,* 226 Ill. 562, the court said (p. 569): "In the first part of the written statement of Philip McEwen he admitted he was present in the after-

noon and evening on the occasion of the shooting. The objection of the plaintiff in error to the admission of said statement went to the entire statement, and not to that part, only, which tended to incriminate the plaintiff in error. Had the objection been limited to the part of the statement which tended to incriminate the plaintiff in error the objection would doubtless have been sustained."

"The authorities have frequently stated that voluntary confessions should be closely scrutinized, and it is generally held that they must be corroborated in order to sustain a conviction. (2 Wharton's Crim. Evidence,—10th ed.—sec. 635; 1 Wigmore on Evidence, 866; Bergen v. People, 17 Ill. 426; South v. People, 98 id. 261; Campbell v. People, 159 id. 9; Brown v. People, 91 id. 506.) If this be the rule as to the character and weight of voluntary confessions when admitted against the person who made them, there is surely much more reason to place about the admission of an involuntary confession which affects a person in no way responsible for it, every safeguard possible under a due and proper administration of the law and such a confession certainly should not be admitted, so far as it affects the guilt or innocence of a third party, if justice can be otherwise administered."

"Our attention has not been called to any case in the briefs, and we know of none, where this precise question, under the circumstances shown in this record, has been passed upon, but on reason and by the application of the principles that have become settled law by other decisions, we cannot see why the criminal law cannot be more justly and wisely enforced by holding that the part of the confession which affected Buckminster should have been refused admission. The reading of this confession admitted

in evidence shows clearly that Fink had confessed his own guilt before he said anything as to Buckminster being connected with the crime. The trial court should have sustained plaintiff in error's objection to admitting that part of the confession that connected him in any way with causing the fire."

It is to be noted that in this 1946 case, the Illinois Supreme Court refuted any possibility that this type of error be subjected to a "harmless error rule" analysis; continuing at Page 447, the Court stated:

"Counsel for the State argue that even though this evidence was improperly admitted, the guilt of plaintiff in error is so clearly shown by other evidence properly in the record that the admission of the confession, when by an instruction of the court it was strictly limited in its effect to Fink, could not injuriously have affected plaintiff in error. With this we cannot agree. The admission of improper testimony that would have a tendency to warp or prejudice the minds of the jury can hardly be considered harmless on this record. This confession was highly prejudicial to plaintiff in error. It would be impossible to decide with any certainty as to whether it would or would not unconsciously affect the jury as to their verdict. If from the legal evidence admitted they had any doubt as to the guilt of plaintiff in error, the jury would not find it easy, or perhaps possible, to remove from their minds the impression produced by this confession."

This Honorable Court's attention is called also to *People* v. *Barbaro*, 395 Ill. 264, a 1946 decision of the Supreme Court of Illinois. Thus it is clear that in Illinois, an error such as the instant case presents would cause a reversal on the merits without any recourse to a "harmless error rule."

Petitioner urges the above analysis on this Honorable Court; petitioner urges that the combined results of *Brookhart* v. *Janis* and *Bruton* v. *United States*, cited *supra*, require reversal without reference to a "harmless error rule."

In similarly strong language, the Supreme Court of Illinois considered the problem of severance and joint trials in *People* v. *Patris*, 360 Ill. 596, 600:

"Currin did not testify. The conviction of Patris depended largely upon the testimony of the police officers as to Currin's confession implicating Patris. Their testimony as to what Currin said out of the presence of Patris about the bombing of the Michigan avenue place was highly prejudicial *and it is impossible to know the extent of its effect upon the jury.* It is apparent that the very situation arose which was anticipated by defendant's counsel when the petition for a severance was filed. The court was advised of the prejudice to defendant which would arise from testimony as to admissions and confessions made out of the presence of defendant, and that an instruction to the jury to disregard it would not remedy the matter."

"The general rule is, that those indicted jointly for the commission of a crime are to be tried together. The matter of granting a separate trial is within the discretion of the court and may not be assigned as error in the absence of abuse of such discretion. Confessions or admissions of one charged with a crime, made out of the presence of a co-defendant, are not competent as against the co-defendant. (People v. Barragan, 337 Ill. 531; People v. Buckminster, 274 id. 435; McCann v. People, 226 id. 562; People v. Johnson, 333 id. 469.) When a motion for a separate trial is made on the ground of a confession by a co-

defendant implicating the mover, a severance should be ordered unless the State's attorney declares that the admissions or confessions will not be offered in evidence upon the trial or unless there be eliminated from the confessions any reference to the co-defendant applying for a severance. (People v. Fisher, 340 Ill. 216; People v. Sweetin, 325 id. 245; People v. Buckminster, supra.) It has been held that, on the plainest principles of justice, if the prosecutor intends to use such confession the prisoner shall be tried separately. (People v. Sweetin, supra; People v. Buckminster, supra; People v. Carmichael, 314 Ill. 460) While it is generally a matter of discretion with the court as to whether a separate trial shall be granted, such discretion is not to be exercised arbitrarily but so as to prevent injustice. *The court instructed the jury to disregard the testimony as to the admissions of Currin made out of the presence of Patris, but the instruction could not cure the damage already done. While, theoretically, the instruction withdrew the evidence from the consideration of the jury, nevertheless the prejudicial effect of the testimony inevitably remained.* People v. Sweetin, supra; People v. Carmichael, supra."

"The denial of the petition for a severance, under the circumstances shown by the record, was an abuse of the court's discretion and undoubtedly contributed largely to the conviction of the defendant. Upon his guilt or innocence we express no opinion, but the constitution guarantees to every person accused of crime, whether innocent or guilty, a fair and impartial trial, and no person should be condemned who has been deprived, over his objection, of such a trial. People v. Sweetin, supra; People v. Bimbo, 314 Ill. 449.

On account of the errors pointed out, the judgment of the criminal court is reversed and the cause is remanded for a new trial.

Reversed and remanded."

In this 1935 case, the "no harmless error rule—automatic reversal" standard was reaffirmed.

The California "Aranda Rule," 63 C.2d 518, has been extensively covered by petitioner in his Petition for a Writ of Certiorari, and will not be repeated. It is to be noted that the California Courts (as did the Second Appellate District Court of Appeals in petitioner's appeal) apply the State "Harmless Error Rule" found in *People* v. *Watson* (1956), 46 C.2d 818, 836, 299 P.2d 243 to the Aranda error. Petitioner asserts that application of the State Harmless error rule is clearly erroneous to this error of constitutional magnitude.

The Court of Appeals of New York considered the matter in 1940 in *People* v. *Feolo,* 282 N.Y. 276. The court stated at 281:

"We may even suppose that no fair mind could read Funicello's testimony and Summerfeld's confessions conjointly and have left in it any reasonable doubt of the guilt of the four defendants. But it is not for us to adjudge guilt in any case; that is for the jury. The question for us on this record is whether substantial injustice was done to Feolo, Mastrone and Brabson by denial of their motions for separate trials.

When defendants are jointly indicted, the question whether there should be separate trials is addressed primarily to the practical good judgment of a trial judge. In

the ordinary case, a ruling directing a joint trial will be on the safe side, though confessions or admissions made by one defendant will not be binding on another. (See *People* v. *Doran*, 246 N.Y. 409; *People* v. *Snyder*, 246 N.Y. 491.) The point at which discretion ends and severance becomes a duty is at times hard to fix. (*People* v. *Fisher*, 249 N.Y. 419.) Here the duty to sever was clear before this trial began, though that is not a controlling consideration now. In *People* v. *Fisher* (*supra*) we said: "A retrospective view by an appellate court may reveal injustice or impairment of substantial rights unseen at the beginning. In a case where, without the existence of a confession by one defendant, the evidence against another would be too weak to justify a conviction or even where a conviction would be doubtful, our review of the judgment would compel us to conclude that an abuse of discretion had been committed. One who made no confession must be found guilty, if at all, only on proof independent of a confession by a codefendant" (pp. 427-428). To us it is here plain that without the confessions of Summerfeld, conviction of the other three defendants would have been far from a certainty. On this record, we cannot say, "Cast out the confessions and the result would need to be the same." (*People* v. *Fisher*, *supra*, p. 426.) Whether Funicello was an accomplice was a question for the jury on any test of that status. His story of antecedent association with Feolo did not go wholly uncontradicted.

True, the jury was charged that Summerfeld's confessions were not valid evidence of the guilt of any of his three codefendants. But the jury was also charged that those confessions were to be considered by them "on the question of whether Funicello was an accomplice or not,

because Summerfeld has testified, at least, he in his statement stated that Funicello was not an accomplice." *This error makes inadmissible any argument that the confessions of Summerfeld could not have been weighed by the jury against Feolo, Mastrone or Brabson.*

As to each of the defendants Feolo, Mastrone and Brabson the judgment of conviction should be reversed and a new trial ordered. As to the defendant Summerfeld, the judgment of conviction should be affirmed."

The Court in the Appellate Division reaffirmed the above case in New York in 1956 in *People* v. *LaRuffa,* 2nd App. Div. Rpts. 2d, 765:

"The People of the State of New York, Respondent, v. Thomas La Ruffa, Appellant.—Appeal from a judgment of the County Court, Kings County, convicting appellant of murder in the second degree, and from intermediate orders, including an order denying a motion for a separate trial and an order denying a motion to set aside the verdict and for a new trial. Over objections by La Ruffa's attorney there were received in evidence statements made by his codefendant Gioiosa, in which Gioiosa attempted to exculpate himself, and accused La Ruffa of the murder of one Sorrentino, the crime of which both Gioiosa and La Ruffa were accused. This evidence was received as against Gioiosa only. La Ruffa, whose motion for a separate trial had been denied and who had made no confession to the authorities, testified in his own behalf, and denied that he had had any connection with the crime. Without the introduction into evidence of these statements made by Gioiosa, and unless they had been considered by the jury as evidence against La Ruffa, it is at least doubtful that the evidence

against La Ruffa would have been sufficient to convince the jury of his guilt beyond a reasonable doubt. While ordinarily the question whether there should be separate trials of defendants, jointly indicted, is addressed to the sound discretion of the Trial Judge, it should have been apparent to the district attorney in this case, at the outset, that a joint trial of Gioiosa and La Ruffa would impair La Ruffa's substantial rights and prevent a fair trial of the case against him. However that may be, it is now apparent, on a reading of the record, that without the so-called confessions by Gioiosa, La Ruffa's conviction would have been far from a certainty, and that the denial of a separate trial to La Ruffa resulted in a substantial injustice to him. (Cf. People v. Feolo, 282 N.Y. 276.) If this were not sufficient, the receipt of the testimony of the witness Marie Cook as to her conversation with Gioiosa was entirely improper, and seriously prejudiced La Ruffa's right to a fair trial. In her testimony as to this conversation, when she and Gioiosa were together in an automobile, and when La Ruffa was not in the automobile or present, the witness Cook stated that Gioiosa, in answer to her question as to who murdered Sorrentino, gave her the name of a certain person who was not in the automobile or present. Although La Ruffa's name was not mentioned and this evidence was purportedly received against Gioiosa only, there could have been no doubt in the minds of the jurors in the light of other testimony received, that the name mentioned by Gioiosa to the witness Cook was that of La Ruffa, and it is difficult to understand the purpose of the introduction of this evidence, if it was not to get before the jury this hearsay evidence as to La Ruffa's guilt. That purpose is further indicated in the summation of the

assistant district attorney, in which he referred to this testimony by the witness Cook, as evidence that Gioiosa had said to Cook "La Ruffa killed him." Under the circumstances, we are unable to say that the errors complained of did not violate La Ruffa's sub. rights, or that they may be disregarded under Section 542 of Code of Criminal Procedure. Judgment Reversed, New trial ordered."

Here, apparently, the New York Court did, however, consider a harmless error rule. Likewise, the Federal Courts have considered the problem, in addition to the *Delli Paoli* case, 352 U.S. 232.

In *United States* v. *Haupt*, 136 F.2d 661, the Court stated:

[15] The crux of the attack upon the alleged unfairness of the trial revolves in the main around the court's denial of defendant's motion for severance. It is earnestly insisted that it was impossible under the circumstances for the individual defendants in a joint trial to obtain a fair and impartial hearing. We are mindful, of course, of the well-established rule that the matter of severance is one within the discretion of the trial court and ordinarily not subject to review. This discretion, however, like any other vested in the trial court is, if abused, subject to review and correction. The main argument as to the alleged unfairness of a joint trial has to do with the prejudicial effect of certain evidence offered by the government.

[16] We shall briefly refer to some of the more compelling grounds upon which we think defendants' contention must be sustained. As already shown, there were introduced in evidence fourteen statements, the length of which it is difficult to describe. Some idea is obtained, however, from the fact that they comprise seventy-three

pages (fifty-seven typewritten pages and sixteen handwritten), and that some three hours' time (so stated in oral argument) was consumed in reading them to the jury. As there is no dispute but that such statements, or at any rate most of them, were of a highly incriminating nature, no purpose could be served in relating their contents. They were not only incriminating as to the defendant by whom made, but in the main equally incriminating against other defendants. True, as the government asserts, such statements were offered in evidence only against the defendant by whom made, and the court instructed the jury accordingly. A reading of these statements, however, leaves no room for doubt but that they were damaging not only as to the defendants against whom offered but as to all others. *We doubt if it was within the realm of possibility for this jury to limit its consideration of the damaging effect of such statements merely to the defendant against whom they were admitted. We have equal doubt that any jury, or for that matter any court, could perform such a herculean feat.*

The holding of the Supreme Court in *Anderson* v. *United States,* heretofore discussed in support of our conclusion that the statements were improperly admitted, is also pertinent to the instant discussion. In that case there were eight defendants, some of whom had made confessions and some not. It was held, for the reasons heretofore stated, that the confessions were improperly admitted. The government contended, however, that even so the convictions should not be reversed as to those defendants, against whom no confessions were admitted. The court said [318 U.S. 350, 63 S.Ct. 602, 87 L.Ed. —]: "The incriminating statement of each petitioner implicated all the others, including those who did not confess. To be sure the trial

court devised a procedure under which the confessions were introduced without mention of the names of the other persons implicated. But their names were in fact revealed in the course of the cross-examination of the confessing petitioners."

The confessions, as here, were admitted only against the persons who made them. The court, in denying the government's contention that the judgment should be affirmed as to the defendants against whom no confessions were admitted, stated: "There is no reason to believe, therefore, that confessions which came before the jury as an organic tissue of proof can be severed and given distributive significance by holding that they had a major share in the conviction of some of the petitioners and none at all as to the others. *Since it was error to admit these confessions, we see no escape from the conclusion that the convictions of all the petitioners must be set aside.*"

If confessions erroneously admitted as to some defendants require reversal as to others against whom no confessions were admitted, it would seem equally plausible that the statements in the instant case, admitted as to certain defendants but incriminating as to all, would produce the same result. *Moreover, one of the defendants in the instant case made no statement, or, if so, it was not introduced, and as to that defendant the situation is precisely the same as in the Anderson case.* We are unaware of any procedure which the trial court could have devised, other than a severance, by which these incriminating statements could have been introduced against the defendants making them, without seriously prejudicing the rights of other defendants.

We refer to another line of testimony admitted against individual defendants but which must have been damaging to all. It is labeled in the government's brief as "background of defendants." This testimony was admitted, so it is asserted, for the purpose of showing treasonable intent or the state of the defendant's mind. It covered an extremely wide field. In fact, as to some of the defendants, it reads as though they were on trial for the sins of a lifetime. We think much of it had no relevancy to the crime of treason. We are not now, however, considering or deciding its relevancy but its effect upon defendants other than those against whom it was admitted. . . .

Here again, this background testimony as to each defendant was offered only as to that particular defendant and the jury was instructed that it was to be only so considered. We seriously doubt, however, if it was possible for the jury to limit its damaging effect to the particular defendant against whom it was admitted.

[17] Inasmuch as these judgments are to be reversed, there is no occasion to relate the evidence with a view of ascertaining its sufficiency to sustain the judgments. A study of the record, however, is convincing that it is not sufficient as to one and perhaps more of the defendants. This is so, even though it be assumed that the incriminating statements were properly admitted. We express this opinion in connection with our conviction that the guilt of individual defendants was not determined merely on evidence properly applicable to such defendant. *If we indulge in the rather violent assumption that the verdict of guilty as to all defendants was not produced by passion and prejudice, it must have been the result of the inability of the jury to segregate from the mass of evidence introduced that rele-*

vant to individual defendants and properly limit it thereto. Such was the inevitable result, under the circumstances of this case, of a joint trial.

The motion for severance filed by each of the defendants called the court's attention to the fact that all of the defendants were charged in the indictment as principals in the crime of treason, which indictment specified forty-one different overt acts, many of them alleged to have been committed by some one or more of the defendants but not all; that the introduction of evidence in a joint trial relating to said overt acts not alleged to have been participated in by all defendants might lead to confusion and prejudice as to those who had not participated in the said overt acts.

At the time the court ruled upon said motions, there was nothing before the court, as far as the record discloses, except the motions for severance and the indictment. The court's action and the exercise of its discretion are to be judged by the circumstances and facts thus presented. While a consideration of a motion for severance where several persons are charged jointly with the commission of the grave crime of treason and numerous overt acts are alleged to which some of the defendants were not parties, must challenge the trial court to the utmost care and caution, we cannot say that the court abused its discretion in overruling such motion.

However, after the trial and all of the evidence as to the so-called background of certain defendants had been heard and the fourteen incriminating statements admitted and the overt acts had been considered, the defendants, by motion for new trial, again appealed to the trial court's discretion to relieve them of the unfair and prejudicial consequences

of a joint trial. Then the court had to consider the task of the jury, which had to keep separated in its mind the involvement of the various defendants in the numerous overt acts, to eliminate from the incriminating statements those parts which involved defendants other than the one against whom such statement was admitted, and to consider only as to such defendant the acts and utterances comprising the so-called background testimony as it related to such defendant. We think that if these facts had been known to the trial court at the time the motion for severance was made, it would have been an abuse of discretion for the trial court to have refused a severance. When presented again in the motion for a new trial when all of these facts and circumstances were known to the court, it was likewise an abuse of discretion to overrule such motion and thus refuse to remedy this prejudicial procedure."

This Honorable Court's attention is directed to the fact that the Circuit Court of Appeal *did not* consider a Federal Harmless Error Rule, but reversed when it realized the facts of the multitude of cross-incriminating statements totalling some 73 pages in length.

As another example, the 5th Circuit Court of Appeals refused to consider whether there was sufficient other evidence to link appellant Devenny to the crime after co-defendant Schaffer's confession was used in their joint trial. That confession implicated Devenny and the jury was "properly" instructed to consider the confession as evidence against Schaffer alone.

Citing with approval *United States v. Haupt*, 136 F.2d 661, 672, the 5th Circuit did not bother to indulge in the use of the Federal "Harmless error" rule.

The Court said, at 18 of 221 F.2d 17:

[1, 2] Devenny moved that he be given a separate trial and supported such motion by affidavit of his counsel, "that the trial of this cause will be the third trial of this matter, the two previous trials having resulted in deadlocked juries. In neither trial of this case has a confession been introduced against defendant, Devenny. In the last trial of this case, a confession made by defendant Schaffer, admitting the offense and implicating defendant, Devenny, was admitted in evidence. This was extremely prejudicial to defendant, James H. Devenny. Defendant, James H. Devenny, has made a statement to authorities but did not admit in it that he committed an offense. Devenny's statement was not used in either of the previous trials and it will be extremely prejudicial to defendant, James H. Devenny, to force him to trial with defendant, Schaffer, who has made a confession which implicates defendant, Devenny."

Devenny's motion for severance was denied and the defendants were tried jointly. The granting or refusing of a severance is within the trial court's discretion and not subject to review or correction unless that discretion is abused. What constitutes abuse of discretion necessarily depends upon the facts in each particular case. *Brady* v. *United States*, 8 Cir., 39 F.2d 312, 313. Under the circumstances of an earlier case, this Circuit held that refusing a severance was not an abuse of discretion, even though the movant's co-defendant had confessed implicating the movant. *Raarup* v. *United States*, 5 Cir., 23 F.2d 547. See, also, *Johnson* v. *United States*, 6 Cir., 82 F.2d 500; *Maxey* v. *United States*, 30 App. D.C. 63; *United States* v. *Fradkin*, 2 Cir., 81 F.2d 56; *Hall* v. *United States*, 83 U.S. App.D.C. 166, 168 F.2d 161, 4 A.L.R.2d 1193; cf. *Dauer* v. *United States*, 10 Cir., 189 F.2d 343, 344.

A careful study of the record in this case, however, leads us to the conclusion that the motion for severance should have been granted. Devenny and Schaffer were together throughout the transaction; both were present on every pertinent occasion. Schaffer's confession implicated Devenny and, while the trial judge eliminated from the confession the statement that "I think that Devenny knew the property was stolen," other parts of the confession clearly prejudiced Devenny in the eyes of the jury. *The court, of course, properly instructed the jury to consider the confession as evidence against Schaffer alone, and to disregard it as evidence against Devenny.*

We believe, however, that the two defendants were so inseparably connected that the jury could hardly have been expected to return a verdict of guilty against one and of not guilty as to the other. There being only two defendants, it would not be very time consuming but entirely practicable to accord them separate trials. *Like the Seventh Circuit in the case of United States v. Haupt, 136 F. 2d 661, 672, "We doubt if it was within the realm of possibility for this jury to limit its consideration of the damaging effect of such statements merely to the defendant against whom they were admitted." We hold, therefore, that the court erred in denying the appellant Devenny a separate trial."*

The Supreme Court of California, speaking through Justice Raymond E. Peters stated in *People* v. *Clark*, 62 C.2d 870, 885:

"Some authorities in this field feel that a denial of a motion to sever amounts to a denial of due process whenever joint trial will require a jury to determine both the

voluntary nature and truth of an extrajudicial statement which incriminates both the maker and his codefendant. The reasoning is that the jury, even though instructed that an extrajudicial statement is not to be considered against any defendant save he who made it, cannot put out of mind its determination of the truth of that statement in all of its details. Hence, it unconsciously accepts the truth of the hearsay.

In Jackson v. Denno, 378 U.S. 368 [84 S.Ct. 1774, 12 L.Ed.2d 908], the United States Supreme Court held that a jury is ordinarily incapable of separating the issue of voluntariness of an extrajudicial statement from the issue of its truth, and that due process requires that the trial judge determine the first issue. If defendants are to be tried under circumstances wherein their several extrajudicial statements incriminate the others, even more is required of the jury than under the situation involved in Jackson. In such case, the jury is expected to forget that it found the statement containing the hearsay incrimination to be true. As said in People v. Chambers, 231 Cal. App.2d 23, 33 [41 Cal.Rptr. 551] "Thoughtful judicial opinions have voiced misgivings as to jurors' ability to segregate evidence into separate intellectual boxes, each containing a single defendant. (People v. Biehler, supra, 198 Cal.App.2d at p. 298 [17 Cal.Rptr. 862]; see also United States v. Haupt, 136 F.2d 661, 673-674.) Unconscious motivations . . . slip into the processes of conscious mentation unseen, unfelt and usually unacknowledged . . . [J]udicial cliches carving jurors' minds into autonomous segments may waver and fail."

In Jackson, supra, the court quoted with approval from Morgan, Some Problems of Proof under the Anglo-Ameri-

can System of Litigation (1956) pages 104-105, where the author says, referring to the issue of voluntariness, "'regardless of the pious fictions indulged by the courts, it is useless to contend that a juror who has heard the confession can be uninfluenced by his opinion as to the truth or falsity of it . . . [T]he rule of exclusion ought not to be emasculated by admitting the evidence and giving to the jury an instruction which, as every judge and lawyer knows, cannot be obeyed.'" If this be so, how can that juror be uninfluenced by that portion of the confession which incriminates a codefendant? If he finds the confession to be true, does he find it true only in those matters wherein the codefendant plays no part? Can he find that the confession is true insofar as it admits that A committed certain acts in concert with B, and not at the same time believe that B committed those same acts in concert with A? By finding the confession to be true, has he not convicted the codefendant without benefit of other evidence? The incongruity of any rule which assumes that this dilemma may be cured by instructions is discussed in a comment in 78 Harvard Law Review 211, at page 213. It has been argued that a proper rule would either (1) require severance of trials when such extrajudicial statements are to be used, (2) make such statements inadmissible when the prosecution insists on joint trial, or (3) allow joint trial and use of extrajudicial statements only after the trial judge has deleted therefrom all reference to any codefendant."

Again, no mention is made that the Court should indulge in the use of a "harmless error" rule.

In finality, petitioner Glenn Martin Harrington asserts that numerous State and Federal tribunals have already

devoted intense thought to this major issue, and have come to the conclusion that this is constitutional error of the highest order. In addition, it is once again asserted that the combined effects of *Brookhart* v. *Janis*, per Justice Hugo L. Black, and *Bruton* v. *United States*, per Justice William Brennan have at this time already decided that the instant error may not be obviated by recourse to any "Harmless Error" Rule.

Petitioner Glenn Martin Harrington's conviction should be reversed and he be awarded a new trial free of the manifold constitutional infirmities which permeated the initial proceeding.

This Honorable Court should declare that this Constitutional error of the first magnitude shall not be subjected to any harmless error analysis.

II.

The Rulings of This Honorable Supreme Court of the United States in George William Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620, Decided May 20, 1968 and Roberts v. Russell, 392 U.S. 293, 20 L.Ed.2d 1100, 88 S.Ct. 1921, Should Require This Honorable Court to Reverse Petitioner's Conviction.

Petitioner contends, and respondent State of California has already admitted, acknowledged, and conceded in its Brief in Opposition to the Writ of Certiorari, that the rulings of this Honorable Supreme Court of the United States in *Bruton* v. *United States* and *Roberts* v. *Russell*, cited *supra*, answer favorably to petitioner Glenn Martin Harrington the questions and issues on appeal set forth in the original petition for certiorari, namely:

1. Does the joint trial of codefendants in a criminal proceeding before a jury composed of lay citizens where confessions of codefendants implicating this petitioner are introduced in evidence and where said codefendants do not take the witness stand for cross examination purposes violate the confrontation clause of the 6th Amendment and the due process clause of the 14th Amendment to the United States Constitution?

2. Does the process of instructing that lay jury that they are to consider the confessions only as evidence against the confessor and not as evidence against the implicated party sufficiently guarantee due process of law under the 14th Amendment to the party implicated in view of this Honorable Court's ruling in *Jackson* v. *Denno* (1964), 378 U.S. 368, 12 L.Ed.2d 908, 84 S.Ct. 1774?

3. Is the doctrine of *Delli Paoli* v. *United States* (1957), 352 U.S. 232, 1 L.Ed.2d 278, 77 S.Ct. 294 still valid law in view of the combined effect of the decisions of this Honorable Court in *Jackson* v. *Denno* (1964), 378 U.S. 368, 12 L.Ed.2d 908, 84 S.Ct. 1774, *Turner* v. *Louisiana* (1965), 379 U.S. 466, 13 L.Ed.2d 424, 85 S.Ct. 546, *Pointer* v. *Texas* (1965), 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065, *Douglas* v. *Alabama* (1965), 380 U.S. 415, 13 L.Ed.2d 934, 85 S.Ct. 1074 and *Brookhart* v. *Janis* (1966), 384 U.S. 1, 16 L.Ed.2d 314, 86 S.Ct. 1245?

4. Does not the combined effects of the above cited cases in question 3, interpreting the 6th and 14th Amendments, require, as a protection of a specific constitutional right, that procedures as set forth by the Supreme Court of the State of California in *People*

v. *Aranda, et al.* (1965), 63 Cal.2d 518 be now regarded as the law of the land?

6. Does not the denial of a motion to sever the moving party's trial from that of his codefendant amount to a denial of due process of law whenever said joint trial will require the jury to determine both the voluntary nature and truth of an extrajudicial statement which incriminates both the maker and his codefendant?

These issues have been repeated for the benefit of the Court to emphasize the acknowledgement given by the State of California and its Attorney General Thomas C. Lynch that they have already been resolved in the favor of this petitioner. See Respondent's Brief in opposition to Writ of Certiorari, Page 7.

In *Bruton*, this Court stated the following significant facts:

1. At 20 L.Ed.2d 476, 478, Justice Brennan states:

"This case presents the question, last considered in Delli Paoli v. United States, 352 U.S. 232, 1 L.Ed.2d 278, 77 S.Ct. 294, whether the conviction of a defendant at a joint trial should be set aside although the jury was instructed that a codefendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence."

2. At 20 L.Ed.2d 476, 479, Justice Brennan continues:

"We granted certiorari to reconsider Delli Paoli. 389 U.S. 818, 19 L.Ed.2d 70, 88 S.Ct. 126. The Solicitor General has since submitted a memorandum stating that "in light of the record in this particular case and in the interests of justice, the judgment below

should be reversed and the cause remanded for a new trial." The Solicitor General states that this disposition is urged in part because "[h]ere it has been determined that the confession was wrongly admitted against [Evans] and his conviction has been reversed, leading to a new trial at which he was acquitted. To argue, in this situation, that [petitioner's] conviction should nevertheless stand may be to place too great a strain upon the [Delli Paoli] rule—at least, where, as here, the other evidence against [petitioner] is not strong." We have concluded, however, that Delli Paoli should be overruled. We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. We therefore overrule Delli Paoli and reverse.

3. At Page 479, the basic premise of *Delli Paoli* was explained, and reasons given for its repudiation:

"[2] The basic premise of Delli Paoli was that it is "reasonably possible for the jury to follow" sufficiently clear instructions to disregard the confessor's extrajudicial statement that his codefendant participated with him in committing the crime. 352 U.S. at 239, 1 L.Ed.2d at 284. If it were true that the jury disregarded the reference to the codefendant, no question would arise under the Confrontation Clause, because by hypothesis the case is treated as if the confessor made no statement inculpating the nonconfessor. But since Delli Paoli was decided this Court has effectively

repudiated its basic premise. Before discussing this, we pause to observe that in Pointer v. Texas, 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065, we confirmed "that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him" secured by the Sixth Amendment, id. at 404, 13 L.Ed.2d at 926; "a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him." Id. at 406-407, 13 L.Ed.2d at 927, 928."

4. At Page 484, the fact is emphasized that the jury cannot restrict its thinking to only the confessing defendant, but logically allows the implicated codefendant to be prejudiced; the Court stated:

"[6, 7] Finally, the reason advanced by the majority in Delli Paoli was to tie the result to maintenance of the jury system. "Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense." 352 U.S. at 242, 1 L.Ed.2d at 285. We agree that there are many circumstances in which this reliance is justified. Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. "A defendant is entitled to a fair trial but not a perfect one." Lutwak v. United States, 344 U.S. 604, 619, 97 L.Ed. 593, 604, 73 S.Ct. 481; see Hopt v. Utah, 120 U.S. 430, 438, 30 L.Ed. 708, 711,

7 S.Ct. 614; cf. Fed. Rule Crim. Proc. 52(a). It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information. Nevertheless, as was recognized in Jackson v. Denno, supra, there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Compare Hopt v. Utah, supra; Throckmorton v. Holt, 180 U.S. 552, 567, 45 L.Ed. 663, 671, 21 S.Ct. 474; Mora v. United States, 190 F2d 749; Holt v. United States, 94 F2d 90. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation was directed. Pointer v. Texas, supra."

5. At 485, the final paragraph sums up the error as "a hazard that this court can not ignore"; the court stated:

"We, of course, acknowledge the impossibility of determining whether in fact the jury did or did not ignore Evans' statement inculpating petitioner in de-

termining petitioner's guilt. But that was also true in the analogous situation in Jackson v. Denno, and was not regarded as militating against striking down the New York procedure there involved. It was enough that that procedure posed "substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined. These hazards we cannot ignore." 378 U.S., at 389, 12 L.Ed.2d at 922, 1 ALR3d 1205. Here the introduction of Evans' confession posed a substantial threat to petitioner's right to confront the witnesses against him, and this is a hazard we cannot ignore. Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, *in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all.* See Anderson v. United States, 318 U.S. 350, 356-357, 87 L.Ed. 829, 833, 63 S.Ct. 599; cf. Burgette v. Texas, 389 U.S. 109, 115, 19 L.Ed.2d 319, 325, 88 S.Ct. 258. Reversed."

It is to be noted that in the State of California, the Supreme Court of California, speaking through the learned Associate Justice Mathew Tobriner has decreed that even *judges* cannot compartmentalize their minds to obviate this error.

As petitioner stated in his Petition for a Writ of Certiorari,

"It is to be noted as well that the Supreme Court of California in deciding its original *Aranda* Rule, ap-

parently applied it to a *jury trial only.* Perhaps then with great soul searching, and with perhaps an admission of inability of its own learned trial judges in the Superior Courts of its 58 Counties to disregard the implicating confession as to the non-confessor, the California Supreme Court again through the majority opinion of the learned Justice Tobriner decided the two cases of *People of the State of California* v. *John Charles, Jr. and Oliver Martin Boddie* (1967), 66 Cal. 2d 330, and *People of the State of California* v. *Robert Lee Massie and John Robert Vetter,* June 21, 1967, 66 Cal.2d 899.

In overturning the conviction for first degree murder of John Robert Vetter, Justice Tobriner stated at 916 of 66 Cal.2d 899:

> "Older cases had held almost unanimously that a court could never abuse its discretion in denying a motion for a separate trial because the jury could be admonished not to consider prejudicial testimony admissible only against a codefendant. The more recent cases, however, recognizing the impossibility of a juror's obliteration from his mind of that which he already knew, have held that the court should separate the trials of codefendants in the face of an incriminating confession, ..."

In *People* v. *Massie and Vetter,* the Superior Court of Los Angeles County tried together before Judge H. Burton Noble of Pasadena Robert L. Massie and John R. Vetter, no jury. Robert Massie confessed his crime of robbery and first degree murder of one Mildred Weiss, implicating John Vetter as the driver of the getaway car used in the

crime. Robert Massie did not take the stand for cross-examination after his confession was played via tape recorder and testified to by police witnesses from the stand to the Honorable H. Burton Noble, Judge. John Vetter emphatically denied his guilt from the stand. Both were convicted of first degree murder. Subsequently, Robert Massie made extrajudicial statements exonerating John Vetter as the driver of the get-away car.

On June 21, 1967 the Supreme Court of California reversed Vetter's conviction under the *Aranda* Rule, *People* v. *Aranda* (1965), 63 Cal.2d 518, per Justice Tobriner, at 66 Cal.2d 899.

On November 4, 1967, by jury trial, John Vetter was acquitted in Los Angeles County Superior Court of First Degree Murder, in an ordered retrial.

Realistically, the California Supreme Court has recognized that *experienced trial judges in its own Superior Courts* experience difficulty in disregarding an implicating confession as to its affect on the implicated codefendant.

It is to be noted that dissenting Associate Justices Louis Burke, Stanley Mosk, and Marshall McComb of the California Supreme Court recognized this problem, but kept the faith that the trial level judges could generate the required discernment; at 924 of 66 Cal.2d 899, *People* v. *Massie and Vetter,* Associate Justice Burke states:

> "This was a non-jury case tried by an experienced trial judge who *presumably* (emphasis mine) was able to exclude from his consideration in determining Vetter's guilt evidence admitted solely against Massie (Massie's confession implicating Vetter) and to determine Vetter's guilt on the basis of the evidence rather

than suspicions arising from Vetter's association with Massie. Although at a separate trial Vetter might have obtained exonerating testimony of Massie (Vetter did; California Governor Ronald Reagan stayed Massie's scheduled execution in San Quentin's gas chamber so he could be a witness at Vetter's retrial, and Massie exonerated Vetter) it is likewise possible that Vetter would not have called Massie as a witness or that Massie, if called, would not have given exonerating testimony. Even had Massie been called and given such testimony he could have been impeached by his extrajudicial statements accusing Vetter of being the driver of the get-away car. In my opinion it is not reasonably proper that a result more favorable to Vetter would have been reached in the absence of the asserted errors, and I would affirm the judgments as to Vetter as well as to Massie."

It is hereby submitted that the above case is exemplary authority for the constitutional violation of the confrontation clause of the Sixth Amendment and its prejudicial result; trying Vetter with Massie, introducing into evidence Massie's implicating confession of Vetter (with agreement by the trial judge that he was going to consider the confession only against Massie) and Massie not taking the witness stand for cross-examination purposes was as surely a violation of the Sixth Amendment's confrontation clause as if Massie would have taken the stand and the Court had refused cross-examination. The California Supreme Court recognized the inability of the trial judge to restrict his thinking.

As this Honorable Court is well aware, the doctrine of *Bruton* was made both applicable to the states and totally

retroactive in *Roberts* v. *Russell*, 392 U.S. 293, 20 L.Ed.2d 1100, 88 S.Ct. 1921.

At 1102 of 20 L.Ed.2d 1100, the per curiam decision states:

> "Per Curiam.
>
> In Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620, decided May 20, 1968, we overruled Delli Paoli v. United States, 352 U.S. 232, 1 L.Ed.2d 278, 77 S.Ct. 294, and held that, despite instructions to the jury to disregard the implicating statements in determining the codefendant's guilt or innocence, admission at a joint trial of a defendant's extrajudicial confession implicating a codefendant violated the codefendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. This case presents the question whether Bruton is to be applied retroactively. We hold that it is."

The decision continues:

> "[1] Although Bruton involved a federal prosecution and this is a State prosecution, the right of cross-examination secured by the Confrontation Clause of the Sixth Amendment is made applicable to the States by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065; Douglas v. Alabama, 380 U.S. 415, 13 L.Ed.2d 934, 85 S.Ct. 1074."

The mandates of *Bruton* are reemphasized:

> "Despite the cautionary instruction, the admission of a defendant's confession which implicates a codefendant results in such a "serious flaw." The retroactivity of the holding in Bruton is therefore required; the error

"went to the basis of fair hearing and trial because the procedural apparatus never assured the [petitioner] a fair determination" of his guilt or innocence. Linkletter v. Walker, supra, at 639, n. 20, 14 L.Ed.2d at 614. As we said in Bruton:

> "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant . . . are deliberately spread before the jury in a joint trial." 391 U.S., at —, 20 L.Ed.2d at 485."

Again it is asserted that the combined effects of *Bruton*, *Roberts*, and *Brookhart* v. *Janis*, 384 U.S. 1, would seem to require a reversal of the instant conviction without further consideration. However, as petitioner acknowledges the issue of whether the error may be saved in a given case by recourse to a harmless error rule was not *explicitly* settled in *Bruton* or *Russell*; petitioner asserts in finality that the combined effects of *Brookhart* v. *Janis*, *Bruton* v. *United States*, and *Roberts* v. *Russell* do *implicitly* settle the issue, commanding that recourse to the harmless error rule will not be tolerated, and the judgment must be reversed.

III.

Should This Honorable Court Feel Constrained to Apply a "Harmless Error Rule" to the Facts of This Case, the Appropriate Rule Must Be the Federal Harmless Error Rule, as Enunciated in Chapman & Teale v. California (1967), 386 U.S. 18, 23, 17 L.Ed.2d 705, 87 S.Ct. 824, viz.: "The Prosecution Must Prove Beyond a Reasonable Doubt That the Error Complained of Did Not Contribute to the Verdict Obtained"; When Said Rule Is Applied to the Facts of the Instant Case It Cannot Be Said That, Beyond a Reasonable Doubt, the Error Complained of Did Not Contribute to the Verdict Obtained.

As this Honorable Court correctly set forth in a footnote to *Chapman* v. *California*, 386 US 18, 17 L.Ed.2d 705, 710, the California statutory harmless error rule provides that "after hearing the appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." See also *People* v. *Watson*, 46 C.2d 818.

At Page 710 of 17 L.Ed.2d 705, this Honorable Court stated:

> "[6, 7] The federal rule emphasized "substantial rights" as do most others. The California constitutional rule emphasizes "a miscarriage of justice," but the California courts have neutralized this to some extent by emphasis, and perhaps over-emphasis, upon the court's view of "overwhelming evidence." We prefer the approach of this Court in deciding what was harmless error in our recent case of Fahy v. Connecticut, 375 US 85, 11 L.ed.2d 171, 84 S.Ct. 229. There we

said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Id., at 86, 11 L.ed. 2d at 173. *Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error, this statement in Fahy itself belies any belief that all trial errors which violate the Constitution automatically call for reversal. At the same time, however, like the federal harmless-error statute, it emphasizes an intention not to treat as harmless those constitutional errors that "affect substantial rights" of a party. An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under Fahy, be conceived of as harmless.* Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment. There is little, if any, difference between our statement in Fahy v. Connecticut about "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our Fahy case when we hold, as we now do, that before a federal constitutional error can

be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test, it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard, although achieving the same result as that aimed at in our Fahy case."

This Court's language above bears repeating:

"Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error, this statement in Fahy itself belies any belief that all trial errors which violate the Constitution automatically call for reversal. At the same time, however, like the federal harmless-error statute, it emphasizes an intention *not to treat as harmless those constitutional errors that "affect substantial rights" of a party.*"

It goes without saying that violations of *Bruton* v. *United States*, *Roberts* v. *Russell*, and *Brookhart v. Janis* occurred. It further goes without saying that in the three cases cited immediately *supra*, "constitutional errors of the first order of magnitude occurred," and it is therefore asserted without fear of contradiction that those errors "cannot be treated as harmless because they affect substantial rights of the party, Glenn Martin Harrington."

The rights, of course, are the right to confront all witnesses who testify against him, which right was deprived in the use of the incriminating confessions of codefendants Gilbert Cooper and Jesse Bosby by the People during the trial.

The magnitude of the error might be noted merely by comparing the number of pages of trial transcript devoted to the reading of the confessions of George Rhone, Gilbert Cooper, and Jesse Bosby to the jury.

The prosecution placed on the witness stand Los Angeles police officer Charles William Vaughn. At Page 304 of the trial transcript (Page 198 of the Single Appendix) the reading of the confession of Gilbert Cooper begins. It continues to Page 332, trial transcript, where a recess was taken. In the interim, an in-chambers discussion was held between counsel and the court during which petitioner Harrington's counsel objected to the procedure of attempting to mask the identity of the names mentioned by Cooper during his confession. The discussion in-chambers begins at Page 333 of the transcript (Page 215 of the Single Appendix). And, after heated discussion between counsel, the court, and police officer Charles William Vaughn, culminated in the following very significant colloquy; see below. Petitioner sets forth verbatim the in-chambers conversation between the trial judge, counsel, and the police officer who was to testify and read verbatim the altered confessions. The purpose is manifold:

a. to illustrate the fact that the court was quite aware of the error and prejudicial results;

b. to illustrate the impossibility of ever altering in a meaningful way these confessions;

c. to illustrate the tremendous effort made to alter the confessions, all of which was abandoned when the result became ridiculous.

Humorously, almost, the police officer expressed concern that the jury might infer that he was a poor policeman

because he failed to obtain the names of any of the people he arrested and interviewed!!! (Page 365, R.T.)

The conversation, beginning line 25, Page 363 (Single Appendix, Page 234) through line 11, Page 377 is herewith reproduced:

"The Court: I want to thank you officially, Mr. Rosen, for your help and cooperation. As I say, I read the transcript last night, but I didn't make as meticulous notes as you did and I appreciate your efforts.

Mr. Warnberg: We have just one problem: My officer now is testifying to a revised statement and he is just a little perplexed, and in a way, he probably could be because he is not now reciting or giving a statement as it was actually given.

The Court: Well, he is not committing perjury because we have directed him to do it.

Mr. Rosen: I think what he can say, "In substance here are the questions and answers," using the words "in substance," because that is what he is relating, is the substance of it, not the exact language of it.

Mr. Warnberg: Does it put any reflection on him?

The Court: How can it put a reflection on him when the Court has ordered him to do it?

Mr. Warnberg: Well, could—

The Court: He can't answer to the jury and say, "This isn't an exact statement but this is what I have been told to do," because then we are not going to accomplish our purpose. He is not going to do anything wrong.

Mr. Warnberg: Actually, I think my statement to him was, "Does the statement fairly reflect the conversation?" And it does fairly reflect it, doesn't it?

The Court: I think so.

Mr. Rosen: Sure.

Witness Vaughn: I don't. 40 per cent of it is out.

The Court: Sergeant, I know how you feel. I went over this with you yesterday and I explained it to you yesterday. I don't want to go over it again.

Witness Vaughn: I don't want to be facetious—

The Court: You are not being facetious, you are being argumentative, and you have a right to your point of view and I sympathize with your point of view; but, you have got a job to do and I have got a job to do. Whether you like the way I am doing my job or not is quite immaterial.

Witness Vaughn: I just wanted it clarified, your Honor.

The Court: Clarify what?

Witness Vaughn: I don't think that I am committing perjury or anything like that, but in response to Mr. Warnberg's question, "Is this the substance of your conversation?"—in essence, "No, sir, it isn't."

Now, how do we clarify that with the jury? I am sitting here testifying—

The Court: The jury is not going to see this statement.

Witness Vaughn: I realize that, sir, but they will ask, "You mean this officer didn't ask any names? This officer didn't ask any addresses? This officer didn't ask descriptions of anybody?"

The Court: Well, they might conjecture about it, sir, but none of these lawyers are going to cross examine you and ask you whether you asked them about names. So, it is never going to come out.

You are not on trial as being a good investigator or a poor investigator.

Mr. Gordon: Your Honor, say one of the lawyers should take out in addition to ask if he asked any names, would you stop him?

The Court: No, I am not going to stop him. I will then let the officer testify about all the rest of the conversation that we have stricken here.

If any lawyer gets out of line to that extent, I would let him testify to all, because I think it would be extremely bad faith for any lawyer to question him on that basis now.

Mr. Warnberg: As I understand it now, we have no argument as to probable cause for arrest; we will go right into it and use the statements?

Mr. Gordon: It is nice to get these things clarified before.

The Court: I think certainly I wouldn't have taken all this time to do that if you are going to start cross examining the officer. I will tell you, I will go this far with you: I will cite anyone for misconduct who argues to the jury that this officer, he may not have given you all the statements or he didn't even ask the names, so if he didn't ask the names of the other people involved or some such reflection upon his ability to investigate and that he let something out or that his memory is poor because of that, I am going to cite you for misconduct because you are going to intimate to the jury that perhaps he doesn't know what he is doing or that his memory is bad because of the fact that he didn't do certain things.

It is only a reflection on you, because we have gone through these deletions.

Now, if that is what you want to do, tell me now and I will leave these statements in verbatim.

Mr. Gordon: Well, I think we should get a statement from the lawyers.

The Court: All right. I want to know what you're going to do. I'm warning you now, because, frankly, partially because of Mr. Walton's statement yesterday about this investigating officer. I don't know what you're going to do, after a situation like that.

I don't want that to happen again, or anything like it.

So I'll tell you now that if you intend to have any such argument, or if you intend to have any such cross examination to that effect, let me know now and all of this time will have been wasted, because I'm going to let him give the conversation as it actually took place with all the names less these deletions.

Anybody have anything to say?

Mr. Gordon: Shall we have a stipulation on it so that we know now how we—because some of the men have opposed these corrections, and I would like to know what my position is with my client before we go out and start our hearing.

I would just kind of like to know what the position of these fellows is.

Mr. Walton: Well, I think I made my position known on the objections.

Largely here in the Bosby statement, we have a statement which is not, in essence, terribly incriminating against Harrington as it was originally given. He didn't even know Harrington's name.

Now, with the ambiguities, it becomes potentially very incriminating. That is why I made that objection.

The Court: I think you were the one that started this off, Mr. Walton, by saying, "Judge, I want you to take the time to go in there and edit it—"

Mr. Walton: Listen, Judge, I don't propose to cross examine at all. I have made the objections for the reasons which I have stated, and you have ruled, and I propose to leave it at that as far as these statements go.

The Court: Well, are you telling the Court that the Court has done something that makes it even worse for your client? Is that what you are telling the Court?

Mr. Walton: I made the objection—

The Court: No, answer my question directly. Are you telling this Court that what the Court has done by these deletions is make it look worse for your client than if the deletions had not been made?

Mr. Walton: I can't answer that question.

The Court: Oh, yes, you can, because you made the statement.

Mr. Walton: Your Honor—

The Court: Do you read back what he said, Mr. Reporter? And you listen to what you said, Mr. Walton.

(Record read.)

The Court: That is exactly it. In other words, you are telling me that I have made it worse for your client by the deletions and the changes?

Mr. Walton: I made specific objections to specific deletions, and your Honor overruled them, and I'm just willing to stand on that.

The Court: I'm sorry, Mr. Walton, you're not being truthful with this Court. He just read back your statement that you said. Doesn't that mean that I have made it worse?

I have other lawyers here. I ask you gentlemen, what does he mean by the statement?

Mr. Walton: Well, when your Honor says you made it worse, I am not directing any criticism at your Honor. I appreciate the fact that you have taken two or three hours to go through these statements in this way, because I feel what your Honor is doing is trying to correct a rather unfortunate situation, in that these statements are so vastly incriminating against one or more of the other defendants.

And then a Judge who will take the time in chambers to do this has my admiration. So I'm not being critical of your Honor, and your Honor is inviting me to be critical.

The Court: I am not. I am only reading your statement, which says that the ambiguities have now made it more incriminating for your client. That means to me that what I have done is made it worse for your client.

Now, I'm not talking about personal criticism of me, Mr. Walton. I want to know if what you think what I have done makes it now worse for your client. And if so, I'm going to correct it and change it.

Mr. Walton: When the word "Cooper," say, is stricken from a context of these statements and the phrase, "this other fellow" or "one of the other guys," or something like that is inserted in its place, it leaves the jury to possibly say, "Well, the other guy was Harrington" or "The other guy was Rhone" or "The other guy was Cooper."

They might in total context land on Cooper as being the person to whom Bosby refers.

But that was the basis of objections already made.

The Court: All right, gentlemen, I'm going to change my ruling, if that's the way you feel about it. I have no alternative. You are telling me that I am making it worse for your client, which is, in essence, what you have done. I have no alternative but to leave the statements in as they were made. I don't see how I have any other alternative. You tell me that you are making an objection on that basis.

Any of you other lawyers have any statements to make with respect to this?

Mr. Gordon: Well, it's nice to get a clarification to, at least, what the attitude is.

Now, I'm very sorry that we can't have the clarifications, but—

Mr. Rosen: Well, it was my opinion, Judge, that other than severance, which, of course, would have been most advantageous to all of these defendants, what you have done is of advantage to these defendants by your deletions.

Certainly Harrington is going to suffer by Bosby's statement in its original form more than in its deleted form.

The Court: Sir, that may be true, but that is not what his lawyer has said.

Mr. Rosen: That is my opinion.

The Court: I respect that, and I respect your opinion. That is why I have tried to do what I have done. But when his lawyer is telling me it will make it worse for him and he doesn't want it, then I have no alternative but to do what the lawyer requests, in my opinion, because I'm not trying the case for Mr. Harrington.

Mr. Rosen: I understand that, your Honor.

The Court: Mr. Walton is trying it.

Mr. Moore, do you have any comments, sir?

Mr. Moore: No, sir.

The Court: All right.

Mr. Gordon: Well, your Honor, don't you think—Mr. Moore has expressed himself here some in the past with reference—and I think that we ought to get at least an agreement among the lawyers here before his Honor makes a ruling, whether we want it or don't want it.

I'm for it; I'm for the deletions. Because I certainly think it has helped us tremendously.

Now, what is going to be the conclusion?

The Court: Well, you are apparently for it.

Mr. Rosen: I am.

The Court: And Mr. Moore and Mr. Walton have objected to the changes.

Mr. Gordon: What is your position now, Moore? Do you want the corrections or not?

Mr. Moore: Well, I don't see—you see, I'm trying to represent my client as best I can.

Now, I understand your Honor's position, and I'm not telling you what to do. You make your rulings and you have fairly, I'm sure, in your belief.

I am only saying, starting anew, then, so I'm not misquoted, severance was what we wanted so this problem wouldn't arise.

Now, whether we are right or wrong, severance is denied.

Now, the statements—I say this only—that by striking a word, as I have indicated before, doesn't accomplish anything unless you strike the ultimate end that comes from striking the word.

If you, say, strike the name "Gilbert Cooper cashed a check," you strike the name "Gilbert Cooper" and put in "the other man cashed the check," it's the same as saying "Mr. Cooper."

But I go further and say, as I have, that when they talk—one man here talks that he talked with the other man about robberies, about going in with the check, and one man was there, I think you are building up the conspiracy through one man's statement.

That's all I am saying is, that as long as you let one man talk about conspiracy, not what he did but what other people did, you are adding evidence to the other people's case, even though the Judge instructs the jury that this statement—for example, Mr. Bosby's—is going to be used against Mr. Bosby, I say any reference he has to talking to other people, planning the job with three other men, and all that, can't help but be in the jury's mind that these three other men planned the robbery with Mr. Bosby, and therefore are all guilty of conspiracy to rob.

The Court: All right, gentlemen. I think it is perfectly clear as to what the Court's course of action must be. That is to let the statements in their entirety.

I think it has certainly taught me a lesson—

Mr. Walton: Well, wait a minute.

The Court: We learn every day.

Don't tell me to wait a minute, Mr. Walton. Please don't tell me to wait a minute, sir, when I am speaking. I think that you owe me the courtesy, sir, of allowing me not only to finish but of addressing me properly.

Mr. Walton: I'm sorry. I apologize. Your Honor is correct.

The Court: Without going into that in any further detail, I appreciate the efforts of counsel in trying to arrive at a solution in this case.

I thought I was doing what I considered to be the fair thing. I certainly wanted to do it that way, and I think I tried to do what very few judges have done in the past, trying to make this a fair trial. I see that my efforts have been unsuccessful.

And I will follow the law as it exists today and not try any innovations. I sincerely believe that the motion for severance was properly denied.

I know that these statements are admissible as to the defendant making the statement, and that there is no reason to strike any portion of the statements under the existing law as I understand it.

But I have tried to accomplish something that apparently cannot be accomplished, because of the objections of counsel.

The Court will now rule that the statements may be made in their entirety, with the admonishment to the jury that the statement is admissible only as against the defendant making the statement and for no other purpose as against any other defendant."

The Supreme Court of Illinois in 385 Ill. 554, *People* v. *Serritello,* considered the possibility of blanking out names in confessions, replacing those names with "Blank."

The Court stated:

"The anticipated use of Serritello's confession was the basis of Clow's petition for a separate trial. During the hearing on the petition, the assistant State's Attorney stated they had Serritello's written confes-

sion and expected to introduce it in evidence, that wherever Clow's name appeared it would be deleted and that its use as evidence would be limited to the case against Serritello. Thereupon the court denied Clow's petition for a separate trial.

The general rule is, that those indicted jointly for the commission of a crime are to be tried together. Whether a separate trial should be granted or not is a matter that lies largely within the discretion of the trial court. Such discretion should not be exercised in an arbitrary manner or in such a way as to work an injustice. (People v. Patris, 360 Ill. 596; People v. Sweetin, 325 Ill. 245.) Ordinarily when a motion for a separate trial is made on the ground that a confession by a codefendant implicates the movant, a severance should be ordered unless the State's Attorney declares that the admissions or confessions will not be offered in evidence upon the trial or unless there be eliminated from the confessions any reference to the codefendant applying for a severance. (People v. Fisher, 340 Ill. 216; People v. Sweetin, 325 Ill. 245; People v. Buckminster, 274 Ill. 435.) This practice was followed in this case but under the evidence the deletion of Clow's name from the confession did not remove from the consideration of the jury the prejudicial effect that arises by the implication of a defendant in the confession of a codefendant.

The witnesses who testified on behalf of the People were the owner of the apartment which was burglarized, the police officers who arrested Clow and Serritello in the loop district soon after the burglary and the officer who arrested Clow in April. The foundation

for the introduction of the confession was laid in the testimony of the police officer who made the arrest of Serritello. After testifying to the stopping of the automobile, the taking of Serritello and Clow therefrom and the finding of the stolen articles and the burglar tools in the car, they identified Clow as one that was in the car and in possession of the stolen property. The following, taken from the confession, will serve to illustrate how the deletion of Clow's name from the confession did not disentangle his connection with the stolen articles. In making the confession Serritello was interrogated as to the articles found in his automobile. His answers with Clow's name deleted were: "Well, that blue steel automatic that is laying on the table there, we got that gun in the burglary, and then the little nickel plated gun that is laying along side of it that was Blank's gun, and there there two pair of ladies' stockings that we got in the burglary, they were in the car, too. The fur coat and the radio that we took in the burglary, Blank had sold them to some guy on the North Side before we got arrested, and he gave me $10 for my end." At another place he was asked: "How did Blank and yourself get out of this flat?" His answer was, "We got out through the back door, which we left open." He stated: "I carried the radio and Blank carried the rest of the stuff." He was further interrogated as to the nickel plated revolver found in the automobile and was asked: "Did he [Blank] have that gun on him when you entered this flat last night?" To which he answered: "Yes, he did." At another place he tells of meeting Blank at a street intersection and that Blank got out of the car and took the fur coat and

the radio with him to sell, that after about twenty minutes Blank came back and gave him $10 and "said that he sold the radio and fur coat for twenty bucks."

In the offer of the confession in evidence, the assistant State's Attorney limited its use as evidence to Serritello but the deletion of Clow's name and its restricted use as evidence could not keep the jury from drawing unfavorable inferences against Clow as to whose name had been stricken therefrom. The prejudicial effect of the confession inevitably remained in the minds of the jury.

The judgment of the criminal court is reversed and the cause remanded for a new trial."

The now-unaltered confession of Cooper recommences at Page 383, R.T. (Page 244 of Single Appendix) and concludes at Page 419. Thus Cooper's confession consumed (332-304) + (419-383) = 64 pages of trial transcript.

Codefendant Bosby's statement begins at Page 433 R.T. (Page 273 of Single Appendix) and ends at Page 502, for a total of (502-433) = 69 pages of trial transcript.

Codefendant George Rhone's confession begins at Page 545 of R.T. (Page 338 of Single Appendix) and ends at Page 583 R.T. for a total of (583-545) = 38 pages.

Thus the total pages devoted to reading incriminating confessions to the jury are

64 for Cooper
69 for Bosby
38 for Rhone
171 Total. (Trial Transcript)

The testimony of the only two significant people's witnesses, Ardis Allison Robbins and Darrell Ashcraft consumed (148-37) = 111 pages.

It is thus seen that the major impact of the People's case against the petitioner consisted of the 171 pages devoted to incriminating confessions vis-a-vis the 111 pages devoted to two principal witnesses who, during their trial testimony, admitted telling police officers "4 Negroes carried out the crime." (R.T. Page 91 and R.T. Page 147; corresponds to Single Appendix 88 and 121.)

Petitioner is a Caucasian; codefendants Rhone, Cooper, and Bosby are Negroes. In view of the following cross-examination testimony elicited from People's Witness Robbins at Page 91, R.T. through Page 94, R.T. (Corresponds to Page 88 of Single Appendix), can it be declared beyond a reasonable doubt that the aforementioned confessions *did not* contribute to the conviction of petitioner?

"Q. You say that Harrington had red hair on the occasion you have described in your testimony; is that right? A. Right.

Q. Would that be some other color than his hair presently is? A. Right.

Q. In other words, his hair is not red now, is it? A. No, sir.

Q. Did you take a good look at him that day? A. Yes, sir.

Q. A very good look? A. I took a good look at them all when they came in.

Q. You told the police that there were four Negroes, didn't you? A. No, I thought they were, and—but, I

didn't know whether he was mixed or not when he had the red hair.

Q. Didn't you tell the police that you thought that the one with the red hair had colored blood? A. I said he might have some colored blood.

Q. And you told them that that same evening, isn't that true? A. I said I thought he was—he could be either, but I thought he had some colored blood.

Q. He could be either what or what? A. White or mixed.

Q. Well, do you recall giving a statement to the police on the evening of December the 11th at the Firestone Substation, 7901 South Compton Avenue? A. I was down there, yes, sir.

Q. And that would have been approximately 5:40 that same night, some time about 6:00 o'clock? A. I suppose around there somewhere.

Q. Now, Mrs. Robbins, I am showing you a transcript of the interview that you had with the Sheriff's officers that night. I want to ask you to read to yourself on page 4, typewritten 4, line 8 through line 10, then lines 18 and 19—we will do that first. A. You will have to tell me again which ones.

Q. All right. This is page 4 we are looking at, correct? A. Right.

Q. Then, read lines 8 through 10 to yourself. A. Okay.

Q. Have you done so? A. It is both—

Q. Just a minute, just read to yourself.

Have you done that? A. All right.

Q. Now, read to yourself also lines 18 and 19.

Have you done that? A. Yes.

Q. All right.

Now, I want to turn to page 10 and ask you to read to yourself lines 3 through line 12, on page 10 of your statement.

Have you done so? A. Mm-hum.

Q. Now, let me ask you if you gave the following answers to the following questions in the course of that interview—reading now, your Honor, from page 4, lines 8 through 10:

"Q. —by one of the police officers—"Both colored? A. Uh-huh, and I think the other one was colored, too; I think the red-head is at least partially colored.

"Q. Partially colored? A. Uh-huh, he may have some white blood in him."

Now, down to page 18, lines 18 and 19 on the same page:

"Q. And the other fellow is a light-complected person, at least partially colored? A. Uh-huh."

A. I thought he was.

Q. Now, let me read from page 10 and ask you if you gave these answers to these questions:

"Q. Now, red hair, how did he wear his red hair? A. Just back, I think.

"Q. Pompadour, or was there a wave in it? A. No, it isn't the slick type.

"Q. It isn't the slick type? A. No.

"Q. Now, did the hair look like it could possibly be colored, mixture or colored? A. I would say no, that is what I would judge, that he did use peroxide on it.

"Q. Did he appear to be colored? A. Partly colored, I would say.

"Q. Partly colored? A. Uh-huh."

Now, did you give all of those answers to all of those questions which I have just read? A. I guess I did.

Mr. Warnberg: Objected to as being incompetent, irrelevant and immaterial, your Honor; there seems to be nothing impeaching in the answers given at that time.

The Court: The objection is overruled."

Similarly, the cross-examination of prosecution witness Ashcraft at Page 146, R.T. (Page 120 of Single Appendix):

Cross Examination by Mr. Walton:

"Q. Mr. Ashcraft, you said you heard a shot and saw Mr. Serna fall backwards; is that correct? A. That's correct.

Q. Now, Mr. Serna was behind the refrigerator at that time; is that correct? A. Yes.

Q. You were, also? A. No; at that time, no.

Q. Where were you? A. I was up by the cash register at the time.

Q. And you say you saw Harrington there, the fellow sitting behind me? A. He was in front of the candy rack.

Q. Is that the place marked "Candy case" on the diagram, People's 4? A. That's right.

Q. This is at the time the shot went off? A. No, that was before the shot went off.

Q. And now, at the instant this shot went off, where was he, if he was in there? A. I do not know.

Q. He wasn't behind the refrigerator, was he? A. No, he was not. I do not think so.

Q. Now, as you sit there this afternoon and look at Harrington, do you think he is Negro? A. No, I do not.

Q. Didn't you tell the officers you thought that all four of them were Negro? A. I did.

Mr. Walton: I have nothing further.
The Court: Mr. Gordon."

Again, the simple question is asked:

When the two key witnesses for the prosecution identify all four assailants as Negroes, and petitioner is a Caucasian, can it be said beyond a reasonable doubt that the *Bruton-Roberts-Brookhart* v. *Janis* error did not contribute to the conviction?

> "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* v. *Connecticut*, 375 U.S. 85, 11 L.Ed.2d 171, 84 S.Ct. 229; *Chapman* v. *California* (1967), 386 U.S. 18, 23, 17 L.Ed.2d 705, 710, 87 S.Ct. 824.

The entire confessions are reprinted in the Single Appendix.

Upon consulting the trial transcript testimony of Ardis Robbins and Darrell Ashcraft, it may be noted that both claimed petitioner "drew a gun" and otherwise participated in the crime. However, the question remains, having erred in the Caucasian v. Negro identification, is not the ability of these two witnesses to perceive, recall and narrate placed in substantial doubt?

Petitioner asserts it is; petitioner asserts that beyond question the incriminating confessions contributed to his conviction and if a federal harmless error rule is even required, the proper application of same must result in a reversal of the conviction of Glenn Martin Harrington.

Conclusion

For the foregoing reasons, authorities, and arguments, it is respectfully and prayerfully requested that the conviction of Glenn Martin Harrington be reversed by this Honorable Supreme Court of the United States of America, without recourse to any "harmless error" rules, and without remand to lower courts for further consideration.

Respectfully and prayerfully submitted,

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